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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1986

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DALE E. FOLTZ, Warden,

Petitioner,

-vs-

JOSEPH THOMAS,

Respondent.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED

I.

SHOULD CERTIORARI BE GRANTED WHERE THERE IS NO SPLIT BETWEEN THE SIXTH

AND THE EIGHTH CIRCUITS ON WHEN JOINT REPRESENTATION OF SEVERAL DEFENDANTS CAUSES AN ACTUAL CONFLICT OF INTEREST?

II.

WHAT WAS THE BASIS FOR THE SIXTH CIRCUIT'S RULING THAT AN ADVERSE IMPACT WAS SHOWN?

COUNTER-STATEMENT OF THE CASE

While it is true, as petitioner states, that one attorney, Charles Campbell, represented all three Defendants, it is not true that only Charles Perkins paid him.

> After all three defendants were arrested, Perkins' wife hired Charles Campbell to represent Perkins. She did not hire Campbell to represent either of the the other two defendants. Campbell subsequently visited Thomas and Dorsey in the Wayne County Jail and showed them news clippings about his prior cases. Dorsey retained Campbell as his counsel and arranged to have a friend pay Campbell. Thomas later also accepted Campbell's representation, although he did not personally retain Campbell. (Petitioner's Appendix p. 47.)

Ronald Schigur, the assistant prosecuting attorney who handled the case, testified at the evidentiary hearing that a few weeks before trial he had offered each of the defendants the opportunity to plead to second-degree murder. (EHT I, p. 6.) At that time, the policy of the Wayne County Prosecutor's Office was that all defendants had to accept the plea or none would be allowed to plead. (EHT I, pp. 6-7.)

Campbell testified that during the lunch recess on the day that jury selection began, he recommended that his clients plead guilty because they would otherwise all be convicted of felony murder. (EHT I, p. 39.) None of the three defendants, however, was readily willing to plead. In fact, it took over an hour for Campbell to convince them to plead. (EHT I, p. 34.) He testified that he had to pressure these defendants more than usual to get them to accept the plea bargain. (EHT I, p. 91.) He also testified that "part of the spoon feeding [resulted] from the fact

that all three had to plead or else there was no package, or no deal." (EHT I, p. 92.) He could not remember, however, if any one of the three was more reluctant than the others. (EHT I, p. 83.) Instead, the three were asking whether they could get a better deal. (EHT I, p. 84.) He did remember, on the other hand, that he specifically explained to all three that all had to plead or none could plead. (EHT I, p. 55.)

Campbell also testified that he would not have offered Thomas to testify against the others: "I would not have used Charles Perkins' liberty or Jeffrey Dorsey's liberty or Joseph Thomas' liberty that way. It would have been grossly unfair of me to do that." (EHT I, p. 29.)

Jeffrey Dorsey testified that he was the first to become convinced to plead guilty. (EHT I, p. 100.) He believed that if he did not plead, he would be found guilty anyway. (EHT I, p. 100.) He did not remember, however, which of the other two next decided to plead. (EHT I, p. 100.) He did, however, testify that the plea bargain was a package deal. (EHT I, p. 100.) He told the other two that if they did not plead, he would not be able to. (EHT I, p. 102.) He also testified that, at one point, Judge Del Rio entered the room where Campbell and the three defendants were talking and told Dorsey to help his lawyer to convince the others to plead. (EHT I, p. 102.) Charles Perkins testified that he was the next Defendant to agree to plead and he did so because "the judge wasn't going to let us beat it." (EHT I, pp. 96-97.)

In contrast to Dorsey and Perkins, Mr. Thomas testified that he decided to plead, at least in part, because all three were necessary for a bargain. (EHT I, p. 68 & p. 70.) He testified that he did not believe that he was guilty of the crime charged. (EHT I, p. 6.) At his sentencing, he had told Judge Del Rio that he, unlike the other two, had not fired a shot and that he did not steal anything. (ST, pp. 34-35.) He further testified that what he had said to establish the factual basis for the plea was not

true. (EHT I, p. 65.) Mr. Thomas ultimately felt that he was forced to enter the plea due to pressure from both Campbell and Judge Del Rio (EHT I, p. 69), and because he felt that Campbell was not willing to represent him at a trial. (EHT I, p. 62.)

Prosecutor Schigur also indicated the following during his testimony at the hearing:

> BY COUNSEL FOR MR. THOMAS: Okay. Now, you indicated that Charles Perkins was less culpable. Are you using that word to mean that there was less evidence against him? Is that how you're using the phrase culpable?
>
> PROSECUTOR SHIGUR: Yes, that's -- I don't mean he was less culpable. I mean that I had less evidence against him.[1]
>
> Q. Would you not have made a deal with one of the other people to whom there was more evidence against and have that person testify against Mr. Perkins, who was the shooter? Wouldn't that be to your advantage?
>
> A. If I believed that was true. I mean if I knew that was tue and I couldn't prove it.
>
> Q. Okay. But that would have been something that had you been approached in terms of a plea bargain or in terms of somebody testifying, that's something that you certainly would have considered?
>
> A. I would have thought about it, but see, I mean all we have to go on is Mr. Perkins and Mr. Dorsey saying they were shooters and Mr. Thomas when he took his plea saying he wasn't a shooter; that doesn't mean it's true, that just means that he said it. The --
>
> Q. IF YOU WOULD HAVE -- BUT IF YOU WOULD HAVE SOMEBODY, ONE OF THE THREE, WHO HAD COME TO YOU AND SAID I'M WILLING TO TESTIFY, HERE'S WHAT HAPPENED, AND YOU FOUND OUT IN THAT CONVERSATION THAT THE PERSON YOU WERE TALKING TO WAS NOT AN ACTUAL SHOOTER, BUT THE ONE THAT YOU MIGHT HAVE TROUBLE CONVICTING WAS, THAT CERTAINLY MIGHT LEAD YOU TO WANT TO MAKE A DEAL WITH THAT PERSON'S ATTORNEY, ISN'T THAT TRUE?
>
> A. IF I WERE CONVINCED THAT THAT WERE TRUE, I WOULD HAVE TO THINK ABOUT IT, YES. (Emphasis Added)

---

1 The prosecutors memory as indicated in Petitioner's Statement of Facts, was inaccurate as to the amount of evidence he had against each Defendant. Mr. Dorsey lived next door to the deceased, not Mr. Thomas. Petitioner's Statement of Facts p. 13 and p. 8.

Q. Did anyone -- did Charles Campbell ever apprach you in terms of having either -- any three of these defendants ever testify against the other ones?

A. No. (EHT I, pp. 13-14.)

Campbell remembered that one was less culpable than the other two although in his recollection it was Charles Perkins who was less culpable. (EHT I, p. 82.)

The district court correctly found that there was ineffective assistance of counsel in this situation, and the Sixth Circuit correctly affirmed. In doing so, they held that an adverse impact was demonstrated in the following three ways:

> In the instant case, once Dorsey and Perkins informed Campbell that they desired to plead guilty, Campbell was compelled to refrain from advising Thomas not to plead since doing so would have caused the collapse of the plea agreement to the detriment of Dorsey and Perkins. Furthermore, once Campbell obtained the commitments of Dorsey and Perkins, he was compelled to refrain from seeking a separate deal for Thomas by offering Thomas to testify against Dorsey and Perkins. Since an independent counsel would not have had those concerns, we find that Campbell's conflict had an adverse impact on his representation.
>
> Also, in determining that Campbell's conflict had an adverse impact on the voluntariness of Thomas' plea, the magistrate below explicityly found that "one of the substantial reasons [Thomas] pled guilty was because of Campbell's pressure." According to the magistrate, this pressure resulted from Campbell's desire to prevent the plea agreement from collapsing. We find this analysis persuasive and agree that Campbell's actual conflict adversely affected Thomas's decision to plead. In order to protect the interests of Dorsey and Perkins, it was incumbent on Campbell to convice Thomas to plead guilty, even though Thomas was reluctant and was not in the same situation as Dorsey or Perkins. As Thomas testified at sentencing, he did not shoot either of the victims. This testimony was corroborated by both Dorsey and Perkins, who admitted that they alone shot each of the victims. Thus, Thomas may not have shared the same interest in pleading guilty to charges of second degree murder as did Dorsey and Perkins. This was shown by Thomas' reluctance. His reluctance was overcome, however, upon the urging of Campbell to plead along with the other defendants. We find that Campbell's pressure, which was tainted by a conflict of interest, had an adverse impact on Thomas' decision to enter a guilty plea. Petitioner's Appendix (pp. 76-78)

SUMMARY OF ARGUMENT

The decision below was clearly correct as a matter of well-settled law. There is no conflict between the Sixth Circuit's opinion in this case and the Eighth Circuit's opinion in United States v Shaughnessy, 782 F2d 118 (1986) because Mr. Shaughnessy was represented by an attorney, separate and distinct, from that of his co-Defendants. Moreover, petitioner not only mistakes the burden of proof required when an allegation of ineffective assistance of counsel is based on multiple representation, but also fails to recognize all the facts adduced at the habeas hearing.

REASONS FOR DENYING THE PETITION

Contrary to petitioner's contention, the actual conflict of interest in the case at bar was based on more than just a finding concerning the possibility of a better plea offer in exchange for testimony against the Co-Defendants. Once this is recognized this Sixth Circuit case is easily distinguishable from United States v Shaughnessy, 782 F2d 118 (8th Cir, 1986).

In the case at bar, one attorney represented all three defendants in one proceeding in which an all-or-nothing pleas bargain was offered. In United States v Shaughnessy, supra, one attorney represented Mr. Shaughnessy only, although he was hired by the Co-Defendants. As the Sixth Circuit in Thomas v Foltz pointed out:

> Shaughnessy's attorney vigorously represented the individual interests of Shaughnessy, the attorney did not represent all of the co-defendants, and there was no proof that the attorney pressured Shaughnessy into accepting a plea bargain which was contingent upon all of the co-defendants pleading guilty. All of these facts are in contrast to the present situation, where Campbell was retained not by Thomas by but (sic) Dorsey and Perkins, where Campbell represented all of the co-defendants, and where Campbell pressured a reluctant Thomas to accept the "all or nothing" plea bargain which Dorsey and Perkins had already stated their desire to accept. We believe that these factors render Shaughnessy inapposite and therefore unpersuasive. Petitioner's Appendix pp. 82-83

Moreover, in the case at bar, there was more than a speculative possibility that separate counsel could have sought a

better plea bargain if the Defendant's testimony was offered against his Co-Defendants. (See Counter-Statement of Case pp. 4-5 .)

Therefore on their facts these two cases are very different and decide different issues. There is no conflict between the two circuit and consequently the petition should not be granted.

Lastly, the prosecution contends that the Sixth Circuit found an adverse impact on the attorney's performance based on the prosecution's statement that he would not have offered the Defendant a more advantageous plea to testify against the Co-Defendants because the case against the Defendant was not the "weakest". But this contention is without merit because the Sixth Circuit found an adverse impact based on three components.

First, Campbell could not advise Mr. Thomas to refuse to accept the bargain since to do so would have caused the collapse of the bargain to the detriment of his other two Defendants. Secondly, once Campbell obtained Dorsey and Perkins' agreement to the plea, he could not seek a separate deal for Thomas by offering his testimony against his other two Defendants. Thirdly, Campbell was forced to pressure Mr. Thomas into pleading guilty in order to secure the bargain for the other two Defendants. This had an impact on the voluntariness of the plea. Counter-Statement of the Case p. 5.

Petitioner mistakenly assumes that Mr. Thomas had to show actual prejudice at the habeas hearing.

> The case law is clear that actual prejudice need not be shown. Once a habeas petitioner has proved the existence of an actual conflict, only an adverse impact on the attorney's performance need be shown. Cuyler v Sullivan, 446 US 335, 349, 350, 100 SCt 1708, 64 LEd2d 333 (1980); Ruffin v Kemp, 767 F2d 748, 752 (11th Cir 1985)

The focus is not on what another attorney could have done, but on whether the conflict of interest affected the attorney's actions and the defendant's actions.

RELIEF REQUESTED

For all the reasons stated above, the petition should be denied.

Respectfully submitted,

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962-4090

Dated: July 17, 1987

No._____

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OCTOBER TERM, 1986

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DALE E. FOLTZ, Warden,

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-vs-

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FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE BY MAIL

I, Elizabeth L. Jacobs, a member of the Bar of the Supreme Court of the United States and a counsel of record for Joseph Thomas, Respondent herein, hereby certify that on July 20, 1987, pursuant to Supreme Court Rule, I served copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein as follows:

On Janice M. Joyce Bartee, attorney of record for Petitioner herein, by depositing such copies in the United States Post Office in Detroit, Michigan with first class postage prepaid, properly addressed to Janice M. Joyce Bartee, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine, Detroit, MI 48226.

On Clerk of the United States Supreme Court by depositing such copies in the United States Post Office in Detroit, Michigan with first class postage prepaid, properly addressed to Joseph F. Spaniel, Jr., Clerk of the United States Supreme Court at the Supreme Court of the United States, Washington, D.C. 20543.

All parties required to be served have been served.

ELIZABETH L. JACOBS

Subscribed and sworn to before me
this 20th day of July, 1987

HARRIET N. ATLAS, Notary Public,
Oakland County acting in
Wayne County, Michigan
My Commission Expires 3-25-91